No. 15146

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CLIFFORD L. DUKE, JR., LOUIS GLEN BALLARD, and VIC BUONO,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

REPLY BRIEF ON BEHALF OF APPELLANT, VIC BUONO.

EDGAR G. LANGFORD,
RICHARD L. VAUGHN,
J. PERRY LANGFORD,
416 Spreckels Building,
San Diego 1, California,
Attorneys for Appellant Vic Buono.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

TOPICAL INDEX

TABLE OF AUTHORITIES CITED

Cases

Statutes

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ARGUMENT.

I.

Appellant Buono Could Not Lawfully Be Indicted for nor Convicted of Violations of United States Code, Title 18, Section 545, nor of Conspiracy to Violate Said Section, on Allegations and Evidence Showing That the Objects the Importation of Which Was Involved Were Psittacine Birds.

Appellant contends that the importation of psittacine birds into the United States under circumstances presented in the case at bar is not punishable as a felony under Title 18, U. S. C. A., Section 545, but only as a misdemeanor under 42 U. S. C. A., Section 271a. Appellee asserts that appellants may be punished as violators of both sections, and that the Government may elect under which section it will proceed.

The Government's argument seems to require a clarification of appellant Buono's position in certain respects. On page 27 of his brief the United States Attorney suggests that appellant's contentions lead to the absurdity that a government agency may repeal, supersede or modify any specific Congressional enactment at any time by the issuance of a regulation. Such a result would surely be absurd, but it does not follow from appellant Buono's position. Administrative regulations having the effect of law can only be promulgated upon specific authority of Congress. If they are in conflict with Congressional enactments, that is, if they exceed the authority granted by Congress, they are invalid. If the Surgeon General's regulations relating to psittacine birds are in conflict with any Congressional enactment, they are invalid. We doubt that the Government will contend that the regulations are invalid. Appellant Buono's position is that the two statutes are not in conflict, but that, since they are *in pari materia,* they must be construed together, and that the specific must be considered to govern the general. When one finds statutes proscribing murder, manslaughter and battery, one does not ask which statute the legislature enacted first, nor engage in lengthy discussions as to whether the later worked an implied repeal of the earlier. Such matters are only considered as a last resort, when there is no other way to harmonize the respective statutes. It is well understood in the instance cited that the three statutes are construed together, and each is given effect in its proper sphere. When murder is done, the proper prosecution is for murder, not battery or manslaughter, although the defendant probably would not complain, if the charge were brought under either of the other two statutes. So in the case at bar the Surgeon General's regulation and the gen-

eral smuggling statute should be construed together as evidencing a single Congressional intent. When one smuggles psittacine birds, Congress intended he should be prosecuted under the laws relating to psittacine birds. When he smuggles some other commodity, Congress intended he should be prosecuted under the laws relating to that commodity. Common sense makes it clear that Congress did not intend to make both a misdemeanor and felony of the single act of smuggling psittacine birds. It is furthermore clear that Congress did not intend that a psittacine bird smuggler could escape prosecution as a felon by presenting his birds at the border in compliance with 19 U. S. C. A., Section 1461, before smuggling them across the line. Yet such is the absurd result which follows from the reasoning of the Government.

It does not appear necessary at this time to analyze the cases cited by the Government for the proposition that, when two statutes proscribe the same act, the United States Attorney may elect to prosecute under either. It is apparent from a reading of the decision of the Supreme Court of the United States in *Berra v. United States* (1956), 351 U. S. 131, 100 L. Ed. 1013, 76 S. Ct. 685, that two members of that Court believe that such a holding is contrary to the Constitution of the United States, and that the majority of the Court, feeling that the question had not been raised in the *Berra* case, expressly left it open (see p. 135). In these circumstances we respectfully submit that the duty devolves upon this Honorable Court to re-examine the above question in the light of the *Berra* decision, of the United States Constitution, Amendment V, and of the fundamental concept that ours is a government of laws and not of men.

II.

Appellant Buono Could Not Lawfully Be Indicted for nor Convicted of the Conspiracy Purportedly Charged in Count VII of the Indictment, in View of the Failure of the Government to Allege or Prove Facts Which Would Support the Conclusion That Such Purported Conspiracy Had Any Existence Separate From the Conspiracy Charged in Count IV.

Appellant Buono contends that he was improperly convicted under count VII of the indictment, because the allegations in that count and the evidence offered thereunder showed no conspiracy separate and distinct from that alleged in count IV, of which appellant Buono was acquitted. Appellee does not dispute Buono's position as to the law, but argues that the evidence in the case at bar shows three separate conspiracies. The Government does not discuss Buono's contention that he had the right to be informed in advance of trial as to the basis upon which the Government would seek to establish that the two conspiracies with which he was charged were separate.

The United States Attorney has set forth the facts in the case at bar in his brief. (Appellee's Br., pp. 2-11.) We submit that upon reading that statement a person of ordinary understanding could only conclude that all the facts relate to but one conspiracy. That conspiracy had as its object the smuggling of psittacine birds into the United States for sale. It commenced when John Hadzima found it necessary to take in a partner to help him in his smuggling business. (Appellee's Br., p. 3.) It continued throughout all the times mentioned in the Government's statement of facts. Past experience indicates that it would be unwise to conclude that it has terminated

yet. The Government's statement indicates that from time to time there were changes of personnel. (Appellee's Br., pp. 4-6.) It also appears that there were disputes over how the proceeds of the smuggling were to be divided and that the various conspirators frequently engaged in the practice of trying to cheat one another. (Appellee's Br., pp. 6-10.) However, the changes of personnel and the attempts to secure a greater share of the profits were always subordinate to the fundamental object of the undertaking—the smuggling of birds.

In spite of the clarity with which the unitary character of the conspiracy appears from the Government's recital of the facts, it argues that the whole can be subdivided into several smaller conspiracies. We turn, therefore, to a consideration of the bases upon which the Government seeks to establish the multiplicity of conspiracies. (Appellee's Br., pp. 112-116.) Of course, appellant Buono is only directly concerned with the matter of whether counts IV and VII allege separate conspiracies. However, in order to keep the matter in its full context, we will discuss each of the subdivisions the Government attempts to make.

The United States Attorney commences his discussion of the multiple conspiracy theory with the proposition that the count I conspiracy was a new one formed in 1953 between Helm, Duke and the smugglers to smuggle birds by airplane. (Appellee's Br., p. 113.) In fact, it appears from the Government's statement of facts that this was merely a continuation of the old Hadzima-Spicuzza, *et al.*, conspiracy which had been involved in the *Steiner* case. (Appellee's Br., pp. 3-6.) There was merely an addition of two members, Duke and Helm, for the purpose of

remedying the temporary setback suffered by the conspirators as a result of the loss of their "mules." (Appellee's Br., pp. 4-5.) Helm was, in effect, nothing more than a new "mule" provided by Duke.

The United States Attorney next seeks to separate the so-called count IV conspiracy from that charged in count I. (Appellee's Br., pp. 114-115.) He notes changes in personnel, although he knows full well that adding or dropping members does not create a new conspiracy. (*United States v. Witt,* 2 Cir., 215 F. 2d 580.) Furthermore, the personnel differences are not as distinct as it might appear from counsel's list. Buono may not properly be included as a conspirator, since the jury acquitted him of participation. Of those referred to as, "conspicuously absent," Vosburg, Segovia and Hamm had been inactive since before the alleged inception of the count I conspiracy. (Appellee's Br., pp. 4-5.) Todd and Spicuzza, although not named as unindicted co-conspirators, were proved to have been such. As the United States Attorney points out a few sentences later in the same paragraph, they were the Mexican contact men for the smuggling. One of the overt acts alleged in count IV was the smuggling of a load of psittacine birds for which Spicuzza arranged. (Appellee's Br., pp. 8, 16.) The conspiratorial object alleged in count IV was identical to that alleged in counts I and VII—the smuggling of psittacine birds into the United States for sale. (Appellee's Br., pp. 12, 15-16, 18-19.) Nowhere does the indictment refer in any way to, "hi-jacking," as an object of a conspiracy or otherwise. The evidence shows that the hi-jacking was merely a form of the cheating of each other which the conspirators had practiced as an incident to their smuggling conspiracy from its original inception, that hi-jacking was

futile without successful smuggling, and that, when the hi-jacking began to interfere with the smuggling, the hi-jacking was immediately stopped. It is apparent that the alleged count IV conspiracy was continuous in time with that alleged in count I, and that its object, the smuggling of psittacine birds into the United States for sale, was the same. That purpose was carried out by the same personnel performing the same functions as they had performed in the count I conspiracy. The conspiracies alleged in counts I and IV were one and the same.

Appellee's attempt to make a separate conspiracy of count VII is equally futile. He relies upon a supposed difference in locale. Both counts allege San Diego and Imperial Counties, but they differ in that count IV includes Riverside, while count VII adds Los Angeles. This supposed distinction is so trivial as to be absurd, when one considers that throughout the period involved in this case the conspirators were operating throughout the United States and Mexico, and even in Europe. Counsel again seeks to distinguish the two counts on the basis of differences in personnel. The supposed differences are not impressive, especially when one considers that the smuggling under both counts was carried on by the same persons in the same way. Furthermore, as we have already seen, changes in personnel are not a basis for finding separate conspiracies.

Counsel also seeks to distinguish count IV from count VII on the basis of the presence or absence of, "hi-jacking." We have already seen that "hi-jacking" was only incidental to the alleged count IV conspiracy and was not referred to in the indictment. It is, therefore, not a basis for distinguishing count IV from count VII. Furthermore, "hi-jacking" does not appear to be restricted to

count IV. The Government states that it occurred during the count I period. (Appellee's Br., p. 6.) Counsel also states on page 115 that appellants entered the count VII conspiracy in order to restore the fortunes of Todd and Spicuzza, so that they might hi-jack them further in the future. If this be so, the hi-jacking element is common to counts IV and VII and no possible distinction can be made between them on the basis of it.

For the foregoing reasons we respectfully submit that the Government's attempt to subdivide the single conspiracy shown by the evidence in the case at bar is unsound. Appellant Buono's conviction on count VII and on counts VIII, IX and X based thereon was, therefore, erroneous and must be reversed.

Conclusion.

For the reasons set forth herein and in his Opening Brief, appellant Buono's convictions on counts VII, VIII, IX and X were the result of error. Since the convictions could not have occurred in the absence of the errors, the errors were necessarily prejudicial. Furthermore, while the evidence of wrongdoing in the case at bar was overwhelming, the evidence tending to connect appellant Buono with that wrongdoing was singularly tenuous and unconvincing. We respectfully submit that appellant Buono is not guilty of any offense, and that justice will be done by reversing the judgment of conviction as to him.

Respectfully submitted,

EDGAR G. LANGFORD,
RICHARD L. VAUGHN,
J. PERRY LANGFORD,
By J. PERRY LANGFORD,
Attorneys for Appellant Vic Buono.